Oklahoma Law Review

Volume 50 | Number 1

1-1-1997

Employment Law: *Acevedo v. City of Muskogee* -- Creating a New Doctrine for Judging the Value of Public Employee Speech Rights--Sound Policy or Doctrinal Mutiny?

Timothy Wilson

COMMENT

Employment Law: *Acevedo v. City of Muskogee* — Creating a New Doctrine for Judging the Value of Public Employee Speech Rights — Sound Policy or Doctrinal Mutiny?

I. Introduction

Of all the enumerated rights in the Constitution perhaps few are more cherished than the right of freedom of speech. Americans, when faced with the opposing views of others, have always been quick to assert their First Amendment right to guarantee that their ideas are expressed.[1] However, as history has shown, freedom of speech is not always an absolute guarantee. Certain types of speech that society considers harmful or offensive are frequently banned.[2]

One force exercising control over speech originates in the workplace. In that setting, private employers often punish employees for certain types of speech considered disruptive. Society as a whole, cognizant of the need for an employer to place limited restrictions on its employees during working hours, generally accepts such conditions as being a consequence of employment.

However, an exception to this general belief exists between the public/government employer and its employees. Public employees, perhaps because they associate themselves as an integral part of a government that promotes the free exchange of ideas, often expect and have been granted extra protection for their worktime speech. In addition, the state action doctrine, which exempts private employers from constitutional restrictions, allows a cause of action for constitutional violations perpetrated by the government.[3] Nevertheless, limitations still apply, and the United States Supreme Court has established certain tests to determine whether speech from public employees should be protected. Such tests have generally been applied by lower courts in evaluating speech rights.[4]

On April 11, 1995, the Oklahoma Supreme Court in *Acevedo v. City of Muskogee*[5]

---

1. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

2. See *infra* Part II of this comment for a discussion of specific types of First Amendment limitations.

3. *See generally* Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 231 (discussing state action and stating that there must be some type of balance between the individual rights and the goals of the government).

4. See *infra* Part III(A)-(B) of this comment for a discussion of the tests used to determine the value of public employee speech.

5. 897 P.2d 256 (Okla. 1995). The traditional test referred to in the text evolved from two United

addressed, for the first time in the court's history, the issue of public employee speech rights. In doing so, the court adopted the traditional test established by the United States Supreme Court but failed to apply a 1994 modification that was made to the doctrine.[6]

This comment will examine the Oklahoma Supreme Court's interpretation of the public employee speech doctrine. First, this comment will give a brief history of speech restrictions in conjunction with a detailed review of the United States Supreme Court's decisions on public employee speech. Second, this comment will examine the facts and procedural history of *Acevedo*, followed by a summary of Oklahoma's interpretation of public employee speech rights. Finally, this comment will provide an analysis of Oklahoma's public employee speech doctrine, contrasting it with established Supreme Court doctrine and examining its constitutionality.

II. General Restrictions on Speech[7]

Americans have always cherished their right to express themselves through their speech. However, that right is not absolute. For reasons of national security, public policy, or efficiency, Congress, as well as state and local governments, has occasionally passed laws restricting individual First Amendment right of expression. When these laws are challenged, the United States Supreme Court decides whether or not such laws are constitutional. When determining the status of speech-restrictive laws, the Court applies different levels of scrutiny. Laws which limit individual expression of views will be scrutinized more harshly than laws which regulate speech for objectives unrelated to the suppression of an individual's expression.[8] Speech-restrictive laws in the former category are generally reviewed by a judicial standard known as "categorical balancing."

Categorical balancing, "as its name indicates, . . . is a combination of categorization and balancing. It devises general constitutional categories through balancing the interests relevant to the constitutional provision in question."[9] For issues regarding speech rights, categorical balancing classifies speech of little or no social value.[10] Hence, laws which restrict specific forms of expression usually do so because that

---

States Supreme Court cases: (1) Pickering v. Board of Education, 391 U.S. 563 (1968), and (2) Connick v. Myers, 461 U.S. 138 (1983). The 1994 modification referred to in the text comes from the Supreme Court case of *Waters v. Churchill*, 511 U.S. 661 (1994).

6. See *infra* Part II(A)-(B) for a discussion of the tests used to determine the value of public employee speech.

7. For a comprehensive discussion on categorical balancing and its effect on speech restrictions, see generally Michael Kent Curtis, *Critics of "Free Speech" and the Uses of the Past*, 12 CONST. COMMENT 29 (1995); Jeffrey M. Shaman, *Constitutional Interpretation: Illusion and Reality*, 41 WAYNE L. REV. 135 (1994) [hereinafter Shaman, *Constitutional Interpretation*]; Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297 (1995) [hereinafter Shaman, *Low-Value Speech*].

8. For examples of cases where the Supreme Court uses differential balancing to uphold speech-restrictive laws unrelated to the suppression of an individual's expression, see *United States v. O'Brian*, 391 U.S. 367, 372 (1968) (upholding a law banning the burning of draft cards) and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571-72 (1991) (holding constitutional a law forbidding nude dancing).

9. *See* Shaman, *Constitutional Interpretation*, *supra* note 7, at 161.

10. *See generally* Shaman, *Low-Value Speech*, *supra* note 7, at 329.

expression is considered to be of no social value.[11] For example, in *Chaplinsky v. New Hampshire*,[12] the Court excluded a category of speech from First Amendment protection if that speech constitutes "no essential part of any exposition of ideas and [is] of such slight social value . . . that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[13]

When determining the degree of scrutiny to be applied when evaluating a law, the Court first asks whether the type of restricted speech fits into a predetermined category of high or low value. Hence, in cases involving the categorical balancing of a law restricting speech of low social value, the Court will strictly scrutinize "all content-based restrictions except for those directed at carefully defined categories of low-value speech."[14] As a result, a law prohibiting speech that falls within a low value category will generally be upheld and speech coming from that category will be deemed unprotected so long as the law has been carefully drafted to limit its intrusiveness. However, a law restricting speech that fails to come within one of these categories, falls outside the scope of categorical balancing. Such laws are deemed unconstitutional, and will be reversed unless the government is able to establish a legitimate need for their existence. Three common categories of unprotected speech are incitement, obscenity, and defamation.

A. Incitement

One type of speech failing to qualify for protection is that which advocates an imminent lawless action. In *Schenck v. United States*,[15] the United States Supreme Court held that words constitute a criminal attempt to bring about a proscribed harm, and therefore, are not protected when "used in such circumstances and are of such a nature as to create a clear and present danger" that would bring about the harm.[16] Critics, concerned that any criticism of government policy would now be unprotected, argued that the clear and present danger standard was too vague. Justice Holmes, sharing the same concern, successfully modified the "clear and present danger" test in his dissent to *Abrams v. United States*.[17] Holmes, stating that the Constitution recognized the special value of free speech, argued that the government should not "check the expression of opinions . . . unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[18] Hence, an immediacy clause was added to the clear and present danger test.[19]

---

11. Examples of speech involving no social value are those involving defamation, obscenity, fighting words, and incitement to violence or crime.

12. 315 U.S. 568 (1942).

13. *Id.* at 572.

14. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 118 (1987).

15. 249 U.S. 47 (1919).

16. *Id.* at 52.

17. 250 U.S. 616 (1919). In *Abrams*, the Court upheld the conviction of five Russian immigrants for printing and distributing circulars which criticized American intervention in Russia during World War I. *See id.* at 624.

18. *Id.* at 630 (Holmes, J., dissenting).

19. *Id.*; *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (providing no protection

B. Obscenity

A second type of speech failing to qualify for First Amendment protection is speech which is considered obscene.[20] In *Miller v. California*,[21] the United States Supreme Court defined an expression as obscene if: (1) to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) the work depicts or describes, in an offensive way, sexual conduct specifically defined by statute as unlawful to portray; and (3) the work taken as a whole lacks serious literary, artistic, political, or scientific value.[22]

C. Defamation

A third type of speech not protected by the First Amendment is defamatory speech.[23] The common law of defamation allows for recovery when: (1) a statement was conveyed through voice or print; (2) that statement contained a defamatory meaning; and (3) that defamatory meaning is reasonably understood by a third party.[24] In addition, a further distinction exists in defamation cases involving a public official. Unlike a private individual, a public official has an additional burden of also proving that the defamatory statement was made with knowledge of falsity or in reckless disregard of the truth.[25]

III. Evolution of Public Employee Speech Rights

A. The Pickering and Connick Tests

While the previously mentioned speech limitations apply to everyone in the United States, further constraints have been imposed on the rights of public employees when acting within their scope of employment. Until the mid-twentieth century, public employment was viewed as a privilege that the government could grant on its own

---

for words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

20. *See* Roth v. United States, 354 U.S. 476, 485 (1957).

21. 413 U.S. 15 (1973).

22. *See id.* at 21; *see also* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418 (1966); Roth v. United States, 354 U.S. 476, 488-89 (1957).

23. *See* BLACK'S LAW DICTIONARY 234 (6th ed. 1990) (defining defamation as "[a]n intentional false communication, either published or publicly spoken, that injures another's reputation or good name").

24. *See generally* Gertz v. Welch, 418 U.S. 323 (1974) (stating that "[s]o long as they do not impose liability without fault, states may define for themselves the appropriate standard of liability for publisher or broadcaster of defamatory falsehood injurious to private individual, at least where substance of defamatory statement makes substantial danger to reputation apparent"). The above common law elements are those which have been generally accepted within the states as essential for defamation. *See also supra* note 23 (defining defamation); Colin Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1056 (1962) (outlining the historical background of libel and slander, and tracing the separate conception and development of the two torts in England); RODNEY SMOLLA, LAW OF DEFAMATION 1-3 (1996) (listing the elements for the modern cause of action in a defamation suit).

25. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (establishing a higher burden of proof for public officials bring a defamation suit).

terms.[26] Generally, public employees were expected to accept the restrictions placed upon their First Amendment rights or find employment elsewhere.[27] For example, during the early years of the Cold War when McCarthyism[28] ran rampant throughout the country, the United States Supreme Court upheld legislation aimed at safeguarding public services from disloyalty.[29] Much of this legislation involved requiring individuals to take loyalty oaths as a prerequisite to government employment.

However, gradually, through the persistent arguments of free speech proponents, the Supreme Court began to reverse its earlier position on loyalty oaths. For example, in *Wieman v. Updegraff*,[30] the Court held unconstitutional an Oklahoma law requiring potential state employees to take an oath denying past affiliation with communist organizations.[31] Following *Wiemann*, the Court continued on a trend of disallowing loyalty oaths in a series of cases decided during the 1960s.[32] As a result of these decisions, the Court began to afford public employees legitimate speech rights similar to those given to ordinary citizens under the First Amendment.

The 1968 Supreme Court decision in *Pickering v. Board of Education*[33] represented the Court's first attempt to establish conscious boundaries regarding the speech rights of public employees. In *Pickering*, an Illinois public school teacher was discharged for writing a letter criticizing the school board's policy in allocating funds.[34] The board based the termination on the premise that the letter was "detrimental to the efficient operation and administration . . . of the district."[35]

In holding the board's action unconstitutional, the Court noted that the threat of termination from public employment served as a "potent means of inhibiting

---

26. *See* Mark Coven, *The First Amendment Rights of Policymaking Public Employees*, 12 HARV. C.R.-C.L. L. REV. 559, 563 (1977).

27. *See id.*

28. *See* WEBSTER'S NEW THIRD WORLD DICTIONARY 838 (3d ed. 1988) (defining McCarthyism as "the use of indiscriminate, often unfounded, accusations, sensationalism, inquisitorial investigative methods, etc., as in the suppression of political opponents portrayed as subversive").

29. *See* Adler v. Board of Educ., 342 U.S. 485, 496 (1952) (upholding New York legislation that sought to bar from employment in public schools individuals who advocate, or belong to organizations which advocate, the overthrow of the government by unlawful means); Garner v. Board of Pub. Works, 341 U.S. 716, 724 (1951) (holding constitutional a Los Angeles ordinance requiring all city employees to swear that they did not advocate the overthrow of the government by unlawful means or belong to organizations with such objectives); Gerende v. Board of Supervisors, 341 U.S. 56, 56 (1951) (affirming Maryland statute requiring candidates for public offices to file affidavits stating that they are not subversive persons).

30. 344 U.S. 183 (1952).

31. *See id.* at 192.

32. *See* Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967) (invalidating New York statutes barring employment on the basis of membership in "subversive" organizations); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 897 (1961) (rejecting a statute allowing the government to deny employment based on an individual's previous membership in a particular party); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 288 (1961) (holding unconstitutional a Florida statute requiring state employees to execute a written oath stating no affiliation with the Communist Party).

33. 391 U.S. 563 (1968).

34. *See id.* at 564.

35. *Id.*

speech."[36] Recognizing the desire to protect the ideals of free expression as well as the state's interest in the efficient administration of public services, Justice Marshall wrote that there must be a balance between the employee's interests in commenting on a matter of public concern and the employer's interest in regulating employee speech that would be both disruptive and interfere with efficiency.[37] As a result, the Court established a balancing test to apply the facts of each case with the goal of protecting both the interests of the employee and the employer. The Court, however, provided no standard for lower courts to determine when either the employee's or employer's interest outweighs the other's interest.[38]

Fifteen years later in *Connick v. Myers*,[39] the Supreme Court attempted to clarify the manner in which the *Pickering* test was employed to resolve public employee speech questions. In *Connick*, the Court held the termination of an Assistant District Attorney for distributing a survey relating to personal grievances within the District Attorney's office did not violate the employee's First Amendment right of free speech.[40]

In reevaluating the *Pickering* test, the *Connick* Court determined whether an employee's speech is a matter of public concern to be a "threshold" question that must first be resolved before any balancing of employee and employer interests can take place.[41] Justice White, writing for the majority, defined matters of public concern as being "any matter of political, social, or other concern to the community."[42] Furthermore, he wrote that when a matter of public concern cannot be discerned, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[43] Hence, if the prerequisite issue of whether an employee's statement is a matter of public concern is not answered affirmatively, the employee's speech will not be protected under the First Amendment.

However, if an employee's speech is found to be a matter of public concern, the *Connick* Court noted that an employer has the burden of demonstrating a strong showing of workplace disruption before a termination would be justified.[44] The Court listed the following factors to serve as a guide in determining whether or not a disruption has occurred: (1) whether the statements are fact or ideas and opinions;[45]

---

36. *Id.* at 574.

37. *See id.* at 568.

38. *See id.* at 569 ("Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged.").

39. 461 U.S. 138 (1983).

40. *See id.* at 154.

41. *See id.* at 146.

42. *Id.*

43. *Id.*

44. *See id.* at 152.

45. *See id.* at 154. The Court referred to and stated the popular phrase "under the First Amendment there is no such thing as a false idea." *Id.* at 152; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 (1974).

(2) manner of speech; (3) time of speech; and (4) place of speech.[46] However, as in *Pickering*, the *Connick* Court failed to provide a standard for measuring when a work disruption is significant enough to overcome an employee's right to speak on a matter of public concern.[47]

As a result of creating the threshold requirement of first determining whether an employee's speech is a matter of public concern, the *Connick* Court began to shift away from the previous public employee speech standard outlined in *Pickering*.[48] The original *Pickering* standard involved a form of ad hoc balancing, where public employee speech rights were determined by balancing the interests of the employee against that of the employer. *Connick's* holding, on the other hand, created in essence a two-tier system of review, requiring the Court to first determine that an employee's speech constituted a matter of public concern before engaging in the balancing of employee and employer interests.[49] Hence, the *Connick* holding represents not only a distinct movement away from the direct ad hoc balancing previously observed in *Pickering* but also an attempt to create a more structured formula for reviewing public employee speech cases.[50]

B. Waters v. Churchill: Changing the Test

In 1994, the Supreme Court acted for a second time after *Pickering* in an attempt to further define the test of public employee speech rights. In *Waters v. Churchill*,[51] a plurality of four justices issued a decision narrowing the *Pickering/Connick* test. The plurality opinion, written by Justice O'Connor and joined by Chief Justice Rehnquist as well as Justices Ginsburg and Souter, held that the "discharge of a public employee could be sustained if the employer used reasonable procedures to determine that the First Amendment did not protect the employee's speech."[52] In other words, an employer must conduct a reasonable investigation using the *Pickering/Connick* balancing test to ascertain whether the employee's speech warrants First Amendment protection.[53] As a result, the new test purports to address a due process issue: the need to ensure proper procedural safeguards in the critical pretermination stage.[54]

---

46. *Connick*, 461 U.S. at 152. *See generally* NLRB v. Magnavox Co., 415 U.S. 322, 327 (1974) (stating employee speech which transpires entirely on the employee's own time, and in nonwork areas of the office, bring different factors into the *Pickering* calculus, and might lead to a different conclusion).

47. *See Connick*, 461 U.S. at 154; *see also supra* note 37 and accompanying text.

48. See *supra* notes 33-38 and accompanying text for an explanation of the *Pickering* public employee speech standard.

49. See *supra* notes 41-47 and accompanying text for an explanation of the *Connick* public employee speech standard.

50. *See generally* Peter McCabe III, Connick v. Myers*: New Restrictions on the Free Speech Rights of Government Employees*, 60 IND. L.J. 339 (1985) (offering a detailed explanation of the Supreme Court's decision in *Connick*).

51. 114 S. Ct. 1878 (1994) (plurality decision).

52. *Id.* at 1891; *see* Bruce Bodner, Recent Decision, 68 TEMP. L. REV. 461, 476 (1995).

53. *See* Waters v. Churchill, 114 S. Ct. 1878, 1889 (1994) (stating for an investigation, "[o]nly procedures outside the range of what a reasonable manager would use may be condemned as unreasonable").

54. *See id.* at 1890 ("Where an employee has a property interest in her job, the only protection we

Furthermore, the *Waters* Court questioned whether the *Connick* test should be applied to what the governmental employer thought the employee said or to what the factfinder ultimately determines the employee said.[55] In the end, the plurality adopted an intermediate position, holding that a court should accept the employer's factual conclusions, but only if the employer was reasonable in arriving at those conclusions.[56]

Justice Souter's concurring opinion, however, stated that in order to avoid liability, the employer must not only reasonably investigate what was reportedly said but must also believe the alleged statements were actually spoken.[57] Souter writes, "[a] public employer who did not really believe that the employee engaged in disruptive or otherwise punishable speech can assert no legitimate interest strong enough to justify chilling protected expression, whether the employer affirmatively disbelieved the third-party report or merely doubted its accuracy."[58]

Justice Scalia, joined by Justices Kennedy and Thomas, wrote a separate concurring opinion supporting the plurality's assertion that public employers should possess the power to dismiss governmental employees.[59] However, Scalia disagreed with the plurality's holding that an employer be required to conduct a reasonable investigation before taking disciplinary action.[60] He denounced the investigation requirement, stating that it will inevitably create disharmony with earlier decisions involving government employment and the Due Process Clause, which hold that public employees lack a protected property interest in their jobs and therefore, are not entitled to any sort of hearing before dismissal.[61] Furthermore, he criticized the "reasonable investigation" requirement because it will leave employers guessing whether or not they have satisfied it.[62] In Scalia's opinion, the primary issue is whether or not there has been governmental "retaliation for the employee's speech [which had been based] on a matter of public concern."[63] As a result, Scalia rejected the plurality's procedural requirement of a "reasonable investigation." Instead, Scalia advocated the continued use of the *Connick* test to determine the degree of protection for public employee speech.

The dissenting opinion to *Waters*, written by Justice Stevens and joined by Justice Blackmun, examined what these two justices believed to be a flaw in the reasonable belief standard.[64] In the dissenting opinion, Stevens stated that the plurality goes too far in allowing employers to dismiss employees who engage in protected speech if the

---

have found the Constitution gives her is a right to adequate procedure."); *see also* U.S. CONST. amend. XIV, § 1 ("... nor shall any State deprive any person of life, liberty, or property, without due process of law ....").

55. *See Waters*, 114 S. Ct. at 1880.
56. *See id.* at 1889-90.
57. *See id.* at 1891-92 (Souter, J., concurring).
58. *Id.* at 1892 (Souter, J., concurring).
59. *See id.* at 1893 (Scalia, J., concurring).
60. *See id.* at 1893-94 (Scalia, J., concurring).
61. *See id.* at 1894 (Scalia, J., concurring).
62. *See id.* (Scalia, J., concurring).
63. *Id.* at 1893 (Scalia, J., concurring).
64. *See id.* at 1898-1900 (Stevens, J., dissenting).

employers have a reasonable belief the speech is not protected.[65] Instead, he wrote that the best approach would be to have the trier of fact, rather than the employer, decide what was actually said, and therefore determine if the termination was justified.[66] Stevens' decision not to support the "employer reasonable belief standard" is based on his belief that such a standard would provide less protection to a "fundamental constitutional right than the law ordinarily provides for less exalted rights, including contractual and statutory rights applicable in the private sector."[67] As an alternative, the dissent stated that public employers should have the right to dismiss an employee only if the employee's speech is found to be "unduly disruptive."[68] Hence, the dissent seemed to have considered the plurality's "employer reasonable belief requirement" a ruse, purporting to provide an extra level of employee protection, while in fact doing the opposite by allowing for terminations based upon an employer's reasonable mistake.

However, notwithstanding how one chooses to interpret *Waters*, it is impossible to ignore the plurality's attempt to augment the government's ability to restrict the speech rights of its employees. In writing the opinion, O'Connor noted the importance of allowing the government greater leeway in restricting the speech of its employers as opposed to the speech rights of its citizens. O'Connor wrote:

> [T]he government as employer indeed has far broader powers than does the government as sovereign. . . . This assumption is amply borne out by considering the practical realities of government employment, and the many situations in which, we believe, most observers would agree that the government must be able to restrict its employees' speech.[69]

This statement, however, served a much broader purpose than mere dicta reaffirming the Court's stance in previous cases. Instead, O'Connnor's statement can be considered a catalyst, helping to justify the plurality's resolution to alter the test on public employee speech restrictions. The result, an introduction of an employer reasonable belief/reasonable investigation standard, served to further dilute the Court's judicial review standard of categorical balancing, replacing it with a more deferential reasonable standard of review.

Soon after the *Waters* decision, one commentator noted that:

> In the aftermath of *Waters*, public employees can be discharged for nondisruptive public concern speech. An employer need only show that a reasonable basis existed for believing the statements allegedly made by the employee were not protected by the Constitution. With the introduction of its reasonable employment decision defense, the *Waters* Court made it much easier for public employers to justify adverse employment

65. *Id.* at 1898 (Stevens, J., dissenting).
66. *See id.* (Stevens, J., dissenting).
67. *Id.* at 1898 (Stevens, J., dissenting).
68. *Id.* (Stevens, J., dissenting).
69. *Id.* at 1886.

> decisions that infringe upon the First Amendment rights of public employees.[70]

Hence, by the spring of 1995, lower federal courts were beginning to apply the *Waters* reasonableness standard.[71] In addition, the Oklahoma Supreme Court was at that time hearing a case involving the speech rights of a government employee. Consequently, the holding by the Oklahoma court in *Acevedo v. City of Muskogee*[72] has since raised perplexing questions regarding Oklahoma's standard of review of public employee speech rights.

IV. Oklahoma's Application of the Public Employee Speech Doctrine

A. Acevedo v. City of Muskogee: Statement of the Case

On January 21, 1992, Muskogee Police Detective Art Acevedo was presented with a termination notice.[73] The notice stated that Acevedo had acted in a manner unbecoming the conduct of an officer.[74] In addition, the notice listed three reasons justifying his termination. The first reason involved conversations that allegedly occurred between Acevedo and several rookie officers, in which Acevedo accused senior departmental officials of criminal wrongdoing and subsequently asked the rookie officers to report anything they observed directly to him.[75] The second reason pertained to a letter Acevedo sent to a National Association for the Advancement of Colored People (NAACP) attorney accusing members of the legal community of committing various criminal acts, covering up crimes, and participating in discriminatory activities.[76] Finally, the third ground for dismissal was based on the fact that Acevedo had sent police reports containing the confidential notes of investigative officers to the NAACP attorney in Washington, D.C.[77]

The termination notice was issued following a January 13, 1992, hearing at which six officers were called to testify as to Acevedo's previous actions.[78] The transcripts from the hearing indicated that one officer testified that he was with Acevedo when the alleged conversations with rookie officers took place.[79] Further, a rookie officer testified at the hearing that one such conversation, pertaining to alleged wrongdoing

---

70. Recent Decision, *supra* note 52, at 481-82.

71. *See* Jeffries v. Harleston, 52 F.3d 9, 10 (2d Cir. 1995); San Filippo v. Bongiovanni, 30 F.3d 424, 446 (3d Cir. 1994); Wright v. Illinois Dep't of Children, 40 F.3d 1492, 1506 (7th Cir. 1994); West v. Phillips, 883 F. Supp. 308, 318 (S.D. Ind. 1994).

72. 897 P.2d 256 (Okla. 1995).

73. *See id.* at 257.

74. *See id.* at 259 (quoting the definition of "unbecoming conduct" from the Muskogee Police Department's Policy and Procedures Manual as being that conduct "which brings the department into disrepute or reflects discredit upon the officer as a member of the department, or that which impairs the operation or efficiency of the department or officer").

75. *See id.* at 257-58.

76. *See id.* at 259.

77. *See id.*

78. The termination hearing was held before the Board of Supervisors, which consisted of the police chief, the city's mayor, and two police officers. *See id.* at 257.

79. *See id.* at 258.

within the police department, did occur between him and Acevedo.[80] In addition, a veteran officer testified that Acevedo had initiated similar conversations with him when he was a rookie.[81] This officer also testified that it had become common practice within the department to avoid Acevedo, rather that listening to his complaints.[82]

Police Chief Gary Strum testified that there had been an ongoing investigation into Acevedo's conduct from August 1, 1991, to January 13, 1992.[83] He further stated that termination action was delayed because of Acevedo's participation in a grand jury investigation of the department.[84] Strum testified that he did not want to interfere with the detective's participation in the proceedings.[85]

Acevedo lost an appeal of the termination decision in district court.[86] Subsequently, the Oklahoma Court of Appeals found that: "(1) the employee's termination was supported by the clear weight of the evidence; and (2) Acevedo's right to free speech had not been unconditionally restricted."[87] The Oklahoma Supreme Court granted certiorari to determine whether Acevedo's termination was consistent with the test established by the United States Supreme Court in *Connick v. Myers*.[88]

B. Summary of the Oklahoma Supreme Court's Decision

The court began its analysis of Acevedo's First Amendment rights regarding his alleged statements by applying the balancing test as set out in *Connick*. Vice Chief Justice Kauger, writing for the court, began the opinion by asking the *Connick* threshold question of "whether the employee's speech constituted a matter of public concern."[89] Generally, a matter of public concern has been recognized as "any matter of political, social, or other concern to the community."[90] This question was settled easily enough when the city conceded the issue in its brief.[91] The city acknowledged that speech disclosing governmental wrongdoing or misconduct is generally of public concern.[92] Consequently, the subject matter of Acevedo's speech was recognized as a matter of public concern.

---

80. The rookie officer testified that he and Acevedo went to lunch, at which time Acevedo asked him if he knew of situations of impropriety in the police department. According to the officer's testimony, Acevedo asked him if he was aware of a child molester in the department. Furthermore, the officer stated that Acevedo mentioned that he believed someone had taken cocaine from the police evidence room. *See id.*

81. *See id.*

82. *See id.*

83. *See id.* at 260.

84. *See id.* Acevedo participated as a witness in a grand jury investigation into alleged misconduct within the police department. Acevedo, the primary witness, was unable to verify any of his claims in front of the grand jury. Subsequently, the grand jury found no evidence of wrongdoing.

85. *See id.*

86. *See id.* at 257.

87. *Id.*

88. *See id.*

89. *Id.* at 261.

90. *See supra* notes 41-42 and accompanying text.

91. *See Acevedo*, 897 P.2d at 261.

92. *See id.*

Next, the court addressed the second part of the *Connick* test by asking "whether the employee's interest in expression outweigh[ed] any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of public services performed through its employees."[93] Here, the court balanced Acevedo's interest in protected speech against the overall disruptiveness of that speech to the police department.[94] In doing so, the court reviewed the testimony of the two officers who claimed Acevedo asked them to report anything suspicious in the department to him, promising, in exchange, to advance the officers' careers for their assistance.[95] In addition, the court considered the testimony of an officer who said he began to avoid Acevedo because the conversations were affecting his attitude about the police department.[96] Kauger writes, "[t]hese statements . . . indicate that Acevedo's speech was highly disruptive to the operation of the police department."[97] In the end, the court upheld the lower court's decision that the interests of the police department outweighed Acevedo's speech rights.[98]

While the Oklahoma Supreme Court adhered to precedent by applying the *Connick* balancing test in *Acevedo*, the court failed to adopt the new standard of review set out in the 1994 United States Supreme Court decision *Waters v. Churchill*.[99] That plurality decision requires governmental employers to conduct a reasonable investigation into alleged statements before allowing an employee termination. Consequently, courts reviewing governmental employee terminations are now expected to integrate a reasonable investigation standard into their analysis when performing a *Connick* balancing test.

Acevedo, in his brief to the Oklahoma Supreme Court, argued that the Board of Supervisors at his discharge hearing "was required to find that the police chief reasonably and honestly believed that his speech was unprotected before it could uphold his termination."[100] The Oklahoma Supreme Court disagreed, holding that because *Waters* is a plurality decision it is not applicable in the case at bar.[101] As a result, the court followed only the standards of *Connick* and not the new reasonable investigation requirement of *Waters*.

Justice Opala and Special Judge Chapel both wrote concurring opinions in an attempt to explain why the Oklahoma Supreme Court chose not to apply *Waters*. Opala writes that no plurality opinion by itself is precedential.[102]

---

93. *Id.*

94. *See id.*; *see also* Waters v. Churchill, 114 S. Ct. 1878, 1888 (1994) (emphasizing the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a relatively significant one when it acts as employer).

95. *See supra* notes 76-77 and accompanying text.

96. *See Acevedo*, 897 P.2d at 258-62; *see also supra* note 80 and accompanying text.

97. *Acevedo*, 897 P.2d at 262.

98. *See id.*

99. 114 S. Ct. 1878 (1994). See *supra* notes 53-71 and accompanying text for a full discussion of the *Waters* opinion.

100. *Acevedo*, 897 P.2d at 260.

101. *See id.* at 260-61.

102. *See id.* at 265 (Opala, J., concurring).

> Though a ruling by a divided [United States] Supreme Court is conclusive for the parties then before it, the opinion is not authority for the resolution of any other cases either in that court or in any inferior court. No opinion garnering fewer than five votes can be considered precedential authority.[103]

Furthermore, Opala states that it would be inappropriate to apply *Waters*, because doing so "would be impermissibly *dichotomizing* federal law within this State."[104] This is because, "[a]bsent any United States Supreme Court pronouncement, [the Oklahoma Supreme Court] follow[s] *as a matter of comity* the substantive federal law decisions by the United States Court of Appeals for the Tenth Circuit and that court's constitutional jurisprudence applicable to the states."[105] Opala continues by writing that "[t]he voluntary deference we pay to our circuit's jurisprudence prevents federal law within the State of Oklahoma from becoming dichotomized into *one* corpus of norms administered by federal courts sitting within this State and *another* body of precepts to be followed in Oklahoma state courts."[106] Hence, Opala seems to indicate that the Oklahoma Supreme Court will not follow a United States Supreme Court plurality decision unless it is first adopted by the United States Tenth Circuit Court of Appeals.[107]

Special Judge Chapel, concurring with the result reached by using the *Connick* balancing test, was less convinced in the wisdom of the Oklahoma Supreme Court's decision to disregard the holding in *Waters*.[108] Chapel, believing at least part of the *Waters*' analysis to be of value, wrote:

> *Waters* determines that the *Connick* test should be applied to the facts as the employer reasonably found them to be. The plurality opinion in *Waters* also indicated that the employer must engage in some investigatory procedure, to be evaluated on a case-by-case basis, in arriving at a reasonable belief. While it is clear from the opinion that some procedure must justify an employer's "reasonable" belief regarding employee speech, the suggested requirement for an investigation is not the heart of the opinion. *Waters*' importance lies in its determination of how facts are to be determined under *Connick*.[109]

Hence, while Chapel questions the existence of a per se investigation requirement, he does not doubt the validity of the *Waters* holding that an employer possess a

---

103. *Id.* (Opala, J., concurring) (emphasis omitted); *see also* United States v. Pink, 315 U.S. 203, 214-16 (1942); United States v. Friedman, 528 F.2d 784, 788 (10th Cir. 1976) (citing Hertz v. Woodman, 218 U.S. 205, 213-16 (1910)), *vacated mem.*, 430 U.S. 925 (1977).

104. *Acevedo*, 897 P.2d at 264 (Opala, J., concurring).

105. *Id.* at 264 n.12 (Opala, J., concurring); *see also* Phillips v. Williams, 608 P.2d 1131, 1135 (Okla. 1980); Lepak v. McClain, 844 P.2d 852, 860 n.8 (Okla. 1992); McLin v. Trimble, 795 P.2d 1035, 1047 n.17 (Okla. 1990); Blanton v. Housing Auth., 794 P.2d 412, 418 n.5 (Okla. 1990).

106. *Acevedo*, 897 P.2d at 264 n.12 (Okla. 1995) (Opala, J., concurring).

107. *See id.* (Opala, J., concurring).

108. *See id.* at 266-67 (Chapel, S.J., concurring).

109. *Id.* (Chapel, S.J., concurring).

"reasonable belief" that the statements made by the employee are not protected before speech-related job termination is allowed.

Before rushing to consider the *Waters* holding inapplicable in the case at bar, Chapel believed the court must first determine whether that plurality decision had any precedential value.[110] Chapel disagreed with the statement by the majority that a plurality opinion lacks any precedential authority. He wrote, "[l]ower state and federal courts must frequently parse the opinions included in plurality decisions to determine whether a decision contains any common statement of law, or reaches a common result, which can and should be applied in future cases."[111]

Chapel observes that in *Waters*, seven Justices essentially agreed that the *Connick* test should be applied to the facts as the employer reasonably discovered them to be.[112] The primary disagreement between these Justices focused on the requirement of there being some sort of procedural investigation. As a result, Chapel asserts that the *Acevedo* court, at a minimum, should apply the *Waters* analysis to determine whether the police chief/termination board reasonably believed Acevedo's speech to have been disruptive and therefore unprotected, without necessarily considering whether or not a reasonable investigation was conducted.[113]

V. Analysis of Oklahoma's Public Employee Speech Doctrine

A. The Rule

If one takes a literal interpretation of the Oklahoma Supreme Court's holding in *Acevedo*, the standard regarding public employee speech in Oklahoma becomes: (1) apply the balancing test set forth in *Connick* in order to determine whether the employee's interest in free speech on issues that constitute a matter of public concern are of greater or lesser importance than the employer's interest in promoting both efficiency and discouraging disharmony in the workplace; and (2) ignore the *Waters* reasonable investigation element, at least until the Tenth Circuit adopts the plurality opinion or the United States Supreme Court is able to give a clear majority ruling on the issue.

B. Applying Connick

The *Acevedo* court, in applying the *Connick* balancing test, opted to follow the traditional doctrine for resolving public employee speech disputes. The court's application of the balancing test appears to conform to the procedure established in *Connick*. The court reasonably ruled that Acevedo's statements constituted a matter of public concern and hence passed the first prong of the *Connick* test.[114] These

110. *See id.* at 267 (Chapel, S.J., concurring).

111. *Id.* (Chapel, S.J., concurring).

112. *See id.* at 266-68 (Chapel, S.J., concurring).

113. *See id.* at 268 (Chapel, S.J., concurring).

114. *See* Connick v. Myers, 461 U.S. 138, 143-46 (1983); *see also* Waters v. Churchill, 114 S. Ct. 1878, 1884 (1994) (dicta expressly stating that in order for public employee speech to be protected it must first be considered speech expressing a matter of public concern); Rankin v. McPherson, 483 U.S. 378, 393 (1987); Pickering v. Board of Educ., 391 U.S. 563, 572-74 (1968).

statements of alleged wrongdoing in the police department fit the definition of an issue which would generally qualify as a matter of public concern.[115] The idea of Acevedo's statements being a matter of public concern was further substantiated by the city's own admission to the court that speech purporting to reveal governmental corruption should always be taken seriously and considered a matter of public interest.[116] After reaching this conclusion, the Oklahoma Supreme Court proceeded to balance the interests of Acevedo against the interests of the police department.[117]

In balancing the interests of the two groups, the court relied on the transcript of testimony from fellow officers at Acevedo's termination hearing. The testimony indicated that Acevedo's statements affected both the morale and efficiency of the police department.[118] In addition, Acevedo, prior to the termination hearing, had been unable to prove any of his allegations during a grand jury investigation.[119] As a result of Acevedo's inability to substantiate his claims of departmental wrongdoing, the court concluded that the police department's interests were greater than Acevedo's speech rights.[120]

At first glance one might agree that the Oklahoma Supreme Court correctly determined that the police department's interests outweighed Acevedo's interests. However, a careful examination of the opinion fails to reveal any explicit explanation behind the court's reasoning. The Oklahoma Supreme Court indicated that the testimony from other officers seemed to show how Acevedo's speech generated friction within the police department. However, the court neglected to share its rationale in determining how it viewed the interests of the police department superior to Acevedo's interests.

One possible explanation for the court's decision to assign greater weight to the police department's interests is the fact that Acevedo was unable to convince the grand jury investigating the alleged corruption allegations that any misconduct actually occurred with the department.[121] This fact, by itself, seems to cast doubt on Acevedo's credibility, especially since one officer, testifying later at Acevado's termination hearing, indicated that Acevedo had stated that he had kept documented proof of the alleged departmental misconduct.[122] However, at the termination hearing, Acevado was unable to provide any proof of wrongdoing. Therefore, as a result of the apparent lack of evidence supporting Acevedo's claims, one might argue that a strong inference can be made that the Oklahoma Supreme Court tilted the scales toward the city when weighing the interests of the two sides. If that is in fact what happened, one must next consider whether or not such a subjective judgment by the court is appropriate.

---

115. *See supra* note 42 and accompanying text.
116. *See supra* note 96 and accompanying text.
117. *See supra* notes 93-94 and accompanying text.
118. *See supra* notes 96-97 and accompanying text.
119. *See supra* note 92 and accompanying text.
120. *See Acevedo*, 897 P.2d at 262-63.
121. *See id.* at 260.
122. *See id.* at 259 n.3.

In answering the above question it is important to remember that the *Connick* balancing test is primarily a subjective evaluation of the particular facts in a case. Such tests are often rightfully criticized. These tests require a court to assign a value to one groups' interests and measure it against the interests of another group. Recall the *Connick* balancing test requires the court to examine: (1) whether the employee's statements are fact or ideas and opinions; (2) manner of speech; (3) time of speech; and (4) place of speech.[123] Rarely, however, are such factors clearly determinable from the facts of a case.[124]

Yet despite the above factors designed to aid in the balancing of group interests, of important note is the *Connick* majority opinion that "a stronger showing [by an employer of evidence indicating disruption and inefficiency] may be necessary if the employee's speech more substantially involved matters of public concern."[125] As previously mentioned, the city admitted in its brief that Acevedo's alleged statements of police corruption were sufficient to constitute a matter of public concern.[126] In light of these facts, it appears the Oklahoma Supreme Court acted inconsistently with *Connick* when it, either impetuously or purposely, favored the city's interests without providing a sufficient justification to support its balancing rationale.

The above analysis indicates that the *Connick* Court recognized the existence of varying levels of public concern. As a result, when speech relates to issues deemed to have a higher level of public concern, the government is required to prove a stronger degree of disruption or inefficiency in the workplace. These varying levels of public concern pose an inherent problem for courts attempting to apply the *Connick* test. Thus, it becomes important for courts balancing the interests of both the government and its employees' speech rights to clearly specify the rationale behind their ruling. Otherwise, these courts run the risk of implying a deference to a particular side. In *Acevedo*, the Oklahoma Supreme Court failed to provide any reasoning to support its balancing of the two interests. This failure results in an implication of judicial deference toward the city. However, such a problem can easily be avoided if courts provide a detailed explanation of their balancing rationale.

C. The Oklahoma/Acevedo Standard: Additional Protection for Public Employees or Illusory Shield?

Before considering the potential consequences behind the Oklahoma Supreme Court's decision not to apply the *Waters* reasonableness standard to *Acevedo*, it is

123. *See supra* notes 46-47 and accompanying text.

124. For example, remember one officer testified that Acevedo made statements of police wrongdoing while eating lunch at McDonald's. One could easily consider such a conversation as being made by a person who is off duty and therefore freer to make private statements. Conversely, one could argue that a police officer is on duty even while at lunch, and therefore words spoken during such time are not automatically protected by the First Amendment. *See Acevedo*, 897 P.2d at 258.

125. Connick v. Myers, 461 U.S. 138, 152 (1983); *see also* Waters v. Churchill, 114 S. Ct. 1878, 1887 (1994) (stating when a government employee has a strong interest in speaking on a matter of public concern "the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive").

126. *See supra* note 92 and accompanying text.

important to first examine the influence the decision has made in shaping Oklahoma's public employee speech doctrine. Logically, such an examination must focus upon the likelihood of obtaining a different outcome by following the Oklahoma rule: *Acevedo* standard, rather than the test laid out in the *Waters* decision.

First, the predicted effects of the 1994 *Waters* decision should be recognized and later contrasted with the potential effects of Oklahoma's policy. In doing so, it is important to note that there are critics who argue that the long-term result of *Waters* will be a devaluing of public employee speech rights.[127] Such an argument originated from legal scholars who view the reasonable test of *Waters* as a regressive trend, loosening the standard of review courts apply in cases involving a determination of the value of public employee speech.[128] As mentioned, prior to *Waters*, the *Connick* test established a structured formula to determine the protectability of certain public employee speech; in other words, *Connick* protected such speech proven to be a matter of public concern where it could be shown that the value of such speech outweighed the resulting disruptiveness/loss of efficiency to the governmental employer.[129]

One critic of *Waters* points out the failings of using a reasonableness standard of review by writing:

> Unlike the procedural obligations previously established by the [United States Supreme] Court to protect the free speech rights of the American People from overzealous regulation of subversive political speech, defamation and obscenity, the due process obligations created by the *Waters* Court narrows the scope of public employee First Amendment freedoms. Further, contrary to prior Court decisions which emphasized the importance of fact-finding process rooted in an adversarial, judicial setting, the *Waters* reasonableness test gives employers the authority to make binding factual determinations so long as they are reasonably based.[130]

However, perhaps the most egregious consequence of the use of a reasonableness standard to determine the degree of protection afforded public employee speech is that such a method allows a public employer to "discharge an employee on the basis of a reasonable belief that the employee's statements were unprotected, even if that belief is wrong."[131] This result may occur because the *Waters* standard protects an employer's decision, so long as that decision was both arrived at reasonably and believed in good faith to be true.[132] Hence, what can be termed the *Waters* "reasonable employment decision defense" allows for extreme deference regarding a public employer's decision, including going so far as to someday possibly condemning someone for that which was never spoken.[133]

---

127. *See* Recent Decision, *supra* note 52, at 483.
128. *See id.* at 489.
129. *See* Connick v. Myers, 461 U.S. 138, 152 (1983).
130. Recent Decision, *supra* note 52, at 488.
131. *Id.* at 490 (citing Waters v. Churchill, 114 S. Ct. 1878, 1889 (1994)).
132. *See Waters*, 114 S. Ct. at 1878.
133. *See* Recent Decision, *supra* note 52, at 483-84 (referring to the deference in public employers

Additionally, a critic could assert that the governmental goal of workplace efficiency is itself threatened by the application of the *Waters* reasonableness standard of review. The loss of efficiency is predicted to occur as a result of increased apprehension from all public employees. It has been written that:

> A freer hand for management to control objectionable employee speech with traditional disciplinary techniques will, in turn, discourage employee speech on the job. At-will governmental employees in our nation's hospitals, schools, and public agencies will become increasingly reluctant to criticize inefficient workplace policies and practices as they come to realize that the [United States Supreme] Court has prioritized the needs of governmental managers over free speech rights supposedly guaranteed by [the] Constitution.[134]

Assuming the accuracy of the above assessment, one should genuinely question the rationale behind the United States Supreme Court's decision to adopt a reasonable standard of review for public employee speech. If in fact employees, out of a fear of termination, feel compelled to remain silent and ignore potentially critical issues, there is little doubt that overall efficiency in the workplace will suffer. As a result, one must consider whether the means employed by the *Waters* Court are sufficient to create the desired ends. Specifically, the question that should be asked is: Does the means, a reasonableness standard of review, serve to create the desired ends, increased efficiency in the workplace; or as critics have pointed out, does the reasonable standard have the opposite effect of inhibiting workplace efficiency? The United States Supreme Court in *Waters* adopted the opposing view of critics, claiming that a reasonable standard of review of public employee speech does in fact promote workplace efficiency. Such a view originates from the theory that disharmony created by inappropriate employee speech can easily be corrected by the use of a reasonable standard for employee-speech-related terminations. Thereby, a higher level of efficiency quickly returns to the workplace.[135]

Applying the above analysis to the Oklahoma Supreme Court's decision in *Acevedo* allows the determination of whether a state court, through its adoption of an independent public employee speech doctrine, will be able to avoid some of the perceived pitfalls of the *Waters* decision.[136] Specifically, it is possible to determine whether the *Acevedo* standard offers public employees greater First Amendment speech protection than *Waters*.

The major difference between the two standards involves the degree of scrutiny applied to determine the validity of a public employer's decision to terminate an employee based on that employee's speech. As mentioned, *Waters* uses a reasonableness standard of review, while *Acevedo* employs the two-prong *Connick*

---

that the *Waters* reasonable standard seems to create).

134. *Id.* at 489.

135. *See Waters*, 114 S. Ct. at 1888.

136. See *supra* notes 127-35 and accompanying text for a discussion of some of the perceived problems of the *Waters* decision.

balancing test.[137] Hence, under the *Acevedo* standard, there must be a balancing of employer/employee interests to determine whether speech constituting a matter of public concern is afforded First Amendment protection.[138] Consequently, it is easy for one at first glance to assume that the *Acevedo* standard of review provides more protection than the *Waters* reasonableness standard. However, as will be shown, such an assumption could in fact turn out to be premature.

There is no question that the *Acevedo* standard acts to limit certain types of public employee speech. For example, by directly modeling *Acevedo* after *Connick*, the court provides no constitutional protection at all for private matters spoken by public employees in the workplace. The *Connick* Court ruled that where an employee speaks in the workplace "upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[139] The *Connick* Court further explained that "[the Court's] responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded [protection] by the First Amendment to those who do not work for the State."[140] Hence, as a result of the Oklahoma Supreme Court's decision to follow the rationale of *Connick*, one can safely assume that matters of personal concern spoken in the workplace would also be afforded little if any protection in Oklahoma courts.[141]

However, the above limitation on speech pertaining to matters of private concern that exists in *Acevedo* is probably also present under an application of the *Waters* speech doctrine. *Waters* provides for an employer to act against speech that is reasonably believed to be disruptive to such a degree as to not warrant protection. Consequently, there is no reason to believe that *Waters* rejects the notion that employee speech relating to a matter of private concern, that is both spoken in the workplace and subsequently deemed by the employer to be disruptive, lacks protection.

Therefore, the strongest distinction between the two standards regarding the level of protection afforded public employee speech is perhaps found in that type of speech which is considered to be a matter of public concern. *Acevedo*'s adoption of the *Connick* balancing test requires the employee to establish that the questionable speech constituted a matter of public concern.[142] If employee speech is found by a jury to

137. See *supra* notes 114-26 and accompanying text for a full discussion on the *Acevedo* Court's application of the *Connick* balancing test.

138. *See* Acevedo v. City of Muskogee, 897 P.2d 256, 261 (Okla. 1995).

139. Connick v. Myers, 461 U.S. 138, 147 (1983).

140. *Id.*

141. *But cf. id.* (citing Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979)). In *Givhan*, the Court held that First Amendment protection lies when a public employee arranges to communicate privately with his employer, rather than to express his views publicly. *See Givhan*, 439 U.S. at 415-16. Thus, there is a presumption that First Amendment rights will be afforded to an employee who discusses outside the public setting a matter of private concern with his employer.

142. *See* Connick v. Myers, 461 U.S. 138, 147 (1983).

be a matter of public concern, such speech becomes protected, that is, unless the government-employer is able to show that its interest in efficiency outweighed the value of the speech.[143] Thus, one result of the *Connick/Acevedo* balancing test is that it acts to establish a per se level of protection for speech consisting of issues of public concern.

On the opposite end of the spectrum, however, is *Waters*. Unlike *Acevedo*, the *Waters* reasonableness standard does nothing to establish a per se level of protection for employee speech, even if that speech is deemed to have qualities of public concern. *Waters* does require an application of the *Connick* test. However, that test is applied to what the "government employer reasonably thought was said, not what the trier of fact ultimately determines to have been said."[144] As a result, the reasonableness standard in *Waters* serves to effectively prejudice the purpose behind the balancing of interests. This occurs because the jury is required to balance both the employer and employee interests based upon what the government employer reasonably thought was said, not on what the jury itself determines to have been said. Consequently, the jury is unable to apply the *Connick* balancing test in a neutral manner.

The Oklahoma Supreme Court, by adopting the *Connick* balancing test in *Acevedo*, purports to disassociate itself from the reasonableness standard of *Waters*. If true, one could rationally argue that *Acevedo* provides more protection for public employee speech rights. However, Vice Chief Justice Kauger's majority opinion in *Acevedo* casts doubt on the actual intent of the state court.

For example, when discussing the application of the *Connick* test in balancing the interests of the government employer and employee, Kauger writes: "In balancing Acevedo's interest in protected speech against the potential disruptiveness of the speech to police department operations, we find that the department *reasonably* and in good faith believed Acevedo should be terminated for his disruptive speech."[145] As a result, it appears the majority in *Acevedo* has injected the language of a *Waters* "reasonable belief standard" into what, by the majority's own recognition, is supposed to be a pure *Connick* balancing test.

As a result of the majority's language, it is difficult to determine whether or not the *Acevedo* standard affords more protection to public employees than *Waters*. If the Oklahoma doctrine in *Acevedo* is enforced by strictly applying the *Connick* balancing test, there is no doubt the level of protection would be greater. Employees in the workplace, while not completely free to express matters of private concern, nevertheless would be afforded a higher level of protection for speech involving issues of public concern.[146] Consequently, if such a pure form of the *Connick* balancing test exists in Oklahoma, public employees would also feel less hesitant to share potentially important information regarding matters of public concern.[147]

---

143. *See* Acevedo v. City of Muskogee, 897 P.2d 256, 261 (Okla. 1995).

144. Waters v. Churchill, 114 S. Ct. 1878, 1880-81 (1994).

145. *Acevedo*, 897 P.2d at 262 (emphasis added).

146. *See supra* notes 139-41 and accompanying text.

147. *See supra* note 134 and accompanying text (expressing belief that employees will choose to

However, after taking the above statements into consideration, it is nevertheless impossible to simply discount the "reasonableness" language of the *Acevedo* majority.[148] Perhaps in some latent form it represents a perceived future progression in the eyes of the Oklahoma Supreme Court toward some type of *Waters* standard of review. On the other hand, because of the state court's adamant disavowal of *Waters*, it is doubtful that the state court intended any other result than one which could be arrived at by applying a *Connick* balancing test.[149] Therefore, inferring solely from the written opinion of *Acevedo*, it appears that the Oklahoma Supreme Court, by adopting a pure *Connick* balancing test, has in essence created an Oklahoma public employee speech doctrine that affords greater First Amendment protection than the United States Supreme Court's reasonableness standard in *Waters*.

The above analysis serves to provide a comparison into the different level of speech protection that the *Acevedo* and *Waters* doctrines offer public employees. However, nowhere in the *Acevedo* opinion does the court base its decision to disavow *Waters* solely on the fact that *Waters* is in some way faulty or inapplicable. Hence, in order to justify the validity of the Oklahoma Supreme Court's decision to disavow *Waters*, one must closely examine the rationale provided within *Acevedo*.

D. The Waters Question: Justifying the Oklahoma Supreme Court's Decision to Disavow

While it is clear that the Oklahoma Supreme Court correctly chose to apply the *Connick* balancing test, it is not as clear that the court made the right decision to ignore the reasonable investigation/reasonable belief requirement of the *Waters* plurality.[150] This doubt is only magnified by the court's lack of justification for its decision.[151] Furthermore, the fact that two Justices wrote concurring opinions, each with a different theory as to why *Waters* should not be adopted, only adds to the confusion.[152] Therefore, in order to gain an understanding of Oklahoma's public employee speech policy, one must first determine the court's intent behind the disavowal of the *Waters* opinion. In order to do that, it is important to understand the differing views on the validity of plurality decisions and how these views are interrelated with the explanations of the justices in *Acevedo*.[153] The following discussion is not meant to imply that any particular one of these views on the value of plurality decisions should be adopted as the correct precedential interpretation of

---

remain silent rather than sharing important information with their employer).

148. See *supra* note 145 and accompanying text for a discussion on the "reasonableness" language found in the majority opinion of *Acevedo v. City of Muskogee*, 897 P.2d 256 (Okla. 1995).

149. *See Acevedo*, 897 P.2d at 260-62 (Okla. 1995) (discussing a policy of disavowing *Waters* and instead applying the *Connick* balancing test).

150. See *supra* notes 114-26 and accompanying text for a complete discussion relating to the application of the *Connick* balancing test in *Acevedo*.

151. *See Acevedo*, 897 P.2d at 260-61 (Okla. 1995) (holding by the majority that because the *Waters* decision is a plurality, the court will instead follow the prior precedent of *Connick*).

152. *See id.* at 263, 266 (concurring opinions by Justice Opala and Special Judge Chapel attempting to explain the court's decision to disavowal *Waters*).

153. *See generally* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980).

Waters. Rather, this discussion is an attempt to understand a possible rationale behind the Oklahoma Supreme Court's decision to disavowal *Waters*.[154]

Of the accepted theories on the validity of plurality decisions, two are applicable in the analysis of the *Acevedo* decision. The first view, known as the "strict classical theory of precedent," deals with the historical value of previous cases. "According to the strict classical theory of precedent, the lack of a clear majority rationale in support of the judgment deprived the judgment of all precedential value, and the decision was considered authority for the result only."[155] Since Justice Kauger failed to provide a specific rationale in her majority opinion as to why the *Acevedo* court decided not to adopt *Waters*, one could assume it was because the court had resolved to apply this form of strict interpretation to plurality decisions.[156]

Further credence to this theory can be provided if one accepts the rationale behind Justice Opala's concurring opinion.[157] Opala writes that the Oklahoma Supreme Court acted correctly in applying the *Connick* balancing test in *Acevedo*.[158] However, Opala also states that it would be wrong for the court to adopt the *Waters* plurality opinion until first done so by the United States Court of Appeals for the Tenth Circuit.[159] Hence, Opala's fear of federal law in Oklahoma becoming dichotomized into two sets of norms, one followed by the federal courts within the state and the other by the state courts, serves to advance the strict classical theory of precedent with regard to the value of plurality decisions.[160]

However, adopting such a policy of strict interpretation for all United States Supreme Court plurality decisions would be, to say the least, a questionable action for the Oklahoma Supreme Court to pursue. The United States Supreme Court's pronouncement on substantial federal questions is arguably extremely persuasive for state courts to follow. In addition, any conflicting decision rendered in a state supreme court is likely to be overruled on appeal. Therefore, when considering the above factors, one may question whether the Oklahoma Supreme Court's intent was to totally disavow *Waters*.

Furthermore, if considered in conjunction with the concurring opinion of Special Judge Chapel, the strict classical theory of precedent continues to lose credibility as a viable explanation of the *Acevedo* court's decision not to adopt *Waters*.[161] As previously mentioned, Chapel seems to question the value of a per se investigation requirement, not the importance of the governmental employer having to possess a "reasonable belief" that the statements made by an employee do not constitute

154. *See supra* note 149 and accompanying text.

155. Note, *supra* note 153, at 758 n.11.

156. *See supra* note 149 and accompanying text.

157. See *supra* notes 102-07 and accompanying text for a full summary of Justice Opala's concurring opinion in *Acevedo*.

158. *See* Acevedo v. City of Muskogee, 897 P.2d 256, 263 (Okla. 1995) (Opala, J., concurring).

159. *See id.* at 264 & n.2 (Opala, J., concurring).

160. *See id.* at 264-65 (Opala, J., concurring).

161. See *supra* notes 108-11 and accompanying text for a full summary of Special Judge Chapel's concurring opinion in *Acevedo*.

protected speech.[162] Furthermore, Chapel argues that the court should not rush to disavow *Waters*, without first determining whether the case has any precedential value.[163] As a result, Chapel's and Opala's concurring opinions, both purporting to explain the majority's decision not to apply *Waters*, instead act to contradict the other's analysis, thereby providing no definitive explanation for the majority opinion. Consequently, the strict classical theory of precedent, as asserted by Opala, offers at best an incomplete explanation for the majority's decision.

The second approach commonly used to interpret the value of plurality opinions is the "narrowest grounds theory."[164] This method proposes that where a United States Supreme Court plurality decision appears to be of varying scope or breadth, the opinion concurring in judgment on the "narrowest grounds" represents the highest common denominator of the plurality agreement, and thus should be regarded as authoritative for all other cases.[165] As a general principle, those subscribing to this doctrine consider the narrowest ground to represent "the result that would affect or control the fewest cases in the future."[166] Applying this method to the *Waters* plurality provides lower courts with two possible options as to the narrowest interpretation of the case.[167] As mentioned earlier, Scalia rejected the concept of requiring an employer to conduct a reasonable investigation before taking disciplinary action.[168] Hence, Scalia's opinion denounced the adoption of a new procedural requirement, opting instead to follow the proven course of the *Connick* balancing test.[169] Therefore, since Scalia's opinion does not change the status quo established in *Connick*, one could argue that it is the narrowest interpretation of *Waters*.

Hence, if Scalia's opinion is considered the narrowest interpretation, one could assert that the Oklahoma Supreme Court reached the correct conclusion in *Acevedo*. This is because both Scalia and the *Acevedo* court conclude that *Connick* should be the controlling standard for public employee speech cases. However, for such a conclusion to be valid, the majority in *Acevedo* would have to have based their decision not to adopt *Waters* on the rationale in Scalia's concurring opinion. The problem with this analysis is that the majority in *Acevedo* failed to provide an explanation as to why they chose not to apply the *Waters* reasonable investigation standard.[170] In addition, neither Justice Opala's or Special Judge Chapel's concurring opinions specifically employ Scalia's reasoning.

---

162. *See Acevedo*, 897 P.2d at 266-67 (Chapel, S.J., concurring).

163. *See id.* at 267 (Chapel, S.J., concurring).

164. *See generally* Note, *supra* note 153, at 761-67 (discussing the "narrowest grounds" approach to determining the precedential value of plurality decisions).

165. *See id.*

166. *Id.* at 764.

167. See *supra* notes 59-63 and accompanying text for a full summary of Justice Scalia's concurring opinion in *Waters v. Churchill.*

168. *See* Waters v. Churchill 114 S. Ct. 1878, 1893-98 (1994) (Scalia, J., concurring).

169. *See id.* (Scalia, J., concurring).

170. *See Acevedo*, 897 P.2d 256, 260-61 (Okla. 1995) ("*Waters* is a plurality opinion. Therefore, we rest our pronouncement . . . upon . . . prior Supreme Court precedent . . . .").

The second possible method of applying the narrowest interpretation approach to *Waters* would be through Justice Souter's concurring opinion.[171] Souter asserted that a reasonable investigation requirement would be a useless standard unless the governmental employer actually believed the results from the investigation into the alleged employee speech incident.[172] Hence, one attempting to use the "narrowest grounds" approach to determine the value of the *Waters* plurality could make the argument that Souter's opinion is a more narrow interpretation of the overall rule in *Waters*. Such an argument thus asserts that the true precedential value of the plurality is Souter's opinion.[173]

However, the fact that Souter's concurring opinion in *Waters* could be considered the narrowest interpretation of the case still does not explain why the Oklahoma Supreme Court in *Acevedo* failed to adopt the reasonableness standard of *Waters*. In fact, if Souter's opinion was viewed as precedent, hence requiring all employers to actually believe the results of their investigation, then the *Acevedo* court should have adopted such a policy as Souter recommends. Instead, the *Acevedo* court disavows *Waters*, leaving no meaningful rationale in its opinion to serve as justification for its decision.[174]

Consequently, neither the "strict classical theory of precedent" nor the "narrowest grounds approach" provides an adequate explanation as to why the Oklahoma Supreme Court chose to disavow *Waters*. In addition, since Justice Opala and Special Judge Chapel gave seemingly different reasons for the court's decision not to apply *Waters*, it is questionable as to whether *Acevedo* would stand up to a review by the United States Supreme Court.[175] Once again, the problem with *Acevedo* returns to the fact that the Oklahoma Supreme Court did not fully explain its rationale. In failing to do so, it has left enough open-ended questions to criticize its validity.[176]

E. Long-Term Viability of the Acevedo Public Employee Speech Doctrine

Hence, if it is true that the majority in *Acevedo* has failed to adequately explain why the plurality opinion of *Waters* should not be followed, then does it also mean that the Oklahoma Supreme Court's decision lacks validity? Arguably, a case could be made that by not adopting *Waters*, Oklahoma is acting unconstitutionally by failing to acknowledge an established United States Supreme Court doctrine.

Despite the fact that the Oklahoma Supreme Court's decision to disavow *Waters* does not appear to be justified through either of the two theories relating to the treatment of plurality opinions, nevertheless, perhaps there is an adequate explanation

171. Waters v. Churchill, 114 S. Ct. 1878, 1891-93 (1994) (Souter, J., concurring).

172. *See id.* at 1891-92 (Souter, J., concurring).

173. *See generally* Note, *supra* note 153, at 761-67 (discussing the "narrowest grounds" approach to determining the value of plurality decisions).

174. See *supra* notes 114-26 and accompanying text for a full discussion of the standard of review adopted by the *Acevedo* court.

175. See *supra* note 152 and accompanying text for a discussion of Justice Opala and Special Judge Chapel's concurring opinions.

176. *See supra* note 149 and accompanying text.

behind the state's decision.[177] Prior to *Acevedo*, the Oklahoma Supreme Court was never called upon to address a public employee First Amendment freedom of speech issue. As a result, until 1995, such public employee speech cases arising in Oklahoma were decided in federal court. Consequently, when rendering a decision in *Acevedo*, the Oklahoma Supreme Court lacked prior state precedent and therefore, was required to look to the federal courts for guidance. However, it appears the state court found federal precedent conflicting.[178]

The source of this conflict seems to originate from the relatively recent *Waters* decision. As a result of this recency, *Waters* has yet to be applied within all of the federal circuits. However, as of April 1995, the Tenth Circuit Court of Appeals had already cited to the *Waters* reasonableness standard in two cases, thereby raising the question of whether the Tenth Circuit had in fact recognized *Waters*.[179]

Justice Opala's concurring opinion in *Acevedo*, however, seems to assert that *Waters* had, as of April 1995, not yet been implemented by the Tenth Circuit.[180] As a result, Opala justifies the majority's conclusion to disavow *Waters* on the basis that the plurality decision lacked the acknowledgment of the Tenth Circuit.[181]

In an explanation, Justice Opala writes, "Although [Appellant] *sought a review upon the Waters' standards*, [the Oklahoma Supreme Court] cannot comply with his request. Were we to follow the plurality opinion [of *Waters*] we would be impermissibly *dichotomizing* federal law within this State."[182] Hence, Opala seemed concerned about creating two standards of federal law within Oklahoma, one standard applying the substantive federal law interpretations of the Tenth Circuit Court of Appeals and a second standard originating from the state's own interpretation of federal law.[183]

Consequently, if this sentiment from Justice Opala's concurring opinion is shared by the rest of the justices on the Oklahoma Supreme Court, there is no reason to expect the *Acevedo* doctrine to exist for much longer than a few years. Eventually, the district courts within the Tenth Circuit will begin applying *Waters* to public employee speech cases.[184] After that, it is only a matter of time before one of these cases comes before the Tenth Circuit Court of Appeals.[185] When this occurs, there is no reason to believe the Tenth Circuit Court of Appeals will choose to do anything other

177. *See supra* notes 153-64 and accompanying text.

178. *See Acevedo*, 897 P.2d at 264-65 (Opala, J., concurring).

179. *See* Schiller v. Moore, 30 F.3d 1281, 1284 (10th Cir. 1994) (citing to the *Waters* reasonableness standard); Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 827 n.39 (10th Cir. 1995).

180. *See Acevedo*, 897 P.2d at 264 n.12 (Opala, J., concurring).

181. *See id.* (Opala, J., concurring).

182. *Id.* at 264 (Opala, J., concurring) (emphasis added).

183. *See id.* at 264 & n.12 (Opala, J., concurring).

184. Two such district cases have already cited the *Waters* plurality opinion. *See* Baird v. Cutler, 883 F. Supp. 591, 598 (D. Utah 1995); Ruff v. City of Leavenworth, 858 F. Supp. 1546, 1552 (D. Kan. 1994).

185. By the time of the *Acevedo* decision two such cases had already come before the Tenth Circuit Court of Appeals. However, it appears Justice Opala is not yet convinced the Tenth Circuit Court of Appeals has expressly adopted *Waters*. *See* Schiller v. Moore, 30 F.3d 1281, 1284 (10th Cir. 1994); Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 827 (10th Cir. 1995).

than accept *Waters*.[186] At such a point, Tenth Circuit substantive law regarding public employee speech rights will align with the United States Supreme Court's stated policy, thereby eliminating the threat of the Oklahoma Supreme Court inadvertently dichotomizing federal law within the state.[187] Hence, it is possible to argue that the adoption of the *Waters* "reasonableness standard" by the Tenth Circuit will pave the way for the eventual demise of the *Acevedo* balancing test in Oklahoma.[188]

In the end, one thing is certain: the Oklahoma Supreme Court's decision will not be overturned on appeal. The Appellant, Acevedo, has chosen not to petition the United States Supreme Court for a writ of certiorari.[189] Hence, there are three possible outcomes as to the longevity of the *Acevedo* balancing doctrine. The first possibility is that the doctrine will continue to function as an acceptable method of determining the degree of protection afforded to public employee speech. However, since the United States Supreme Court has already acted in *Waters* to establish a rule addressing public employee speech rights, it is questionable whether a conflicting policy can survive.[190] Thus, the second possibility is that the *Acevedo* standard was unconstitutional the moment it was created, superseded instead by the existing United States Supreme Court policy. Finally, as mentioned, there is the possibility that the Oklahoma Supreme Court will continue to apply the *Acevedo* balancing test until the Tenth Circuit officially adopts the *Waters* plurality opinion, at which time Oklahoma will begin applying a "reasonableness" standard to its balancing test.[191]

Whichever of the above three versions actually occurs, there is no question that a shadow of doubt will continue to loom over the *Acevedo* balancing standard, questioning its constitutionality. The final outcome regarding *Acevedo's* constitutionality signifies much more than a mere satisfying of academic curiosity. It also represents an answer to the important question of whether or not the Oklahoma doctrine actually affords public employee speech greater First Amendment protection than that provided by the federal doctrine.[192] Hence, the viability of *Acevedo* becomes a practical issue. That is to say, the survival of *Acevedo* could eventually lead to an increase of public employee speech cases being filed in Oklahoma courts, where the level of speech protection might be considered to be greater than that offered in the federal courts.[193]

---

186. *See supra* note 185.

187. See *supra* notes 182-83 and accompanying text for a discussion of Justice Opala's concern of dichotomizing federal law within Oklahoma.

188. Note also that because the Tenth Circuit Court of Appeals had already cited to *Waters* in two cases before the Oklahoma Supreme Court decided *Acevedo*, it is possible the state's decision was inconsistent with the Tenth Circuit precedent the moment it was rendered. *See supra* note 185 listing the two cases cited by the Tenth Circuit Court of Appeals.

189. Telephone Interview with William Hinkle, attorney for Art Acevedo (Nov. 15, 1995).

190. See generally *supra* notes 56-75 and accompanying text discussing the *Waters* decision.

191. See *supra* notes 179-87 and accompanying text discussing the issue of whether or not the Tenth Circuit has officially adopted *Waters*.

192. See *supra* notes 126-48 and accompanying text for a discussion into whether *Acevedo* or *Waters* affords public employees greater speech rights.

193. *See supra* notes 126-48 and accompanying text.

F. Acevedo and the Oklahoma Constitution: Another Angle

In addition to deciding to apply a balancing standard to cases involving a question of First Amendment protection and public employee speech, the *Acevedo* court expressly stated that it would not hesitate to protect an employee's speech rights under the Oklahoma Constitution.[194] Justice Opala expanded this belief in his concurring opinion. Opala wrote:

> Had Acevedo [(Appellant)] raised *any* state constitutional argument, I would not be hesitant today to adopt an *expanded* version of the *Waters* plurality command as this State's prophylactic rule of due process under Art. 2, §7 Okl. Const., to be engrafted upon the free-speech guarantee of Art. 2, §22 Okl. Const., which would provide *added* protection for state and local government employees against constitutionally impermissible dismissal, based solely on speech, by mandating a pre-discharge (or pre-suspension) *adversary administrative* hearing to be held before a neutral and detached agency official.[195]

As a result, it appears that the Oklahoma Supreme Court might be willing to adopt the *Waters* concept of a "reasonable investigation" for issues regarding public employee speech rights brought against the backdrop of the Oklahoma Constitution.[196] However, Opala does not elaborate on the degree necessary to state that the belief of a "reasonable employer," as to what an employee allegedly said, would have to be adopted as fact at an investigative hearing. Therefore, it is questionable as to whether the Oklahoma Supreme Court would choose to adopt the entire "reasonableness" standard of *Waters* for cases involving the speech rights of public employees and the Oklahoma Constitution.

Nevertheless, it is important to note that Justice Opala stated that had *Acevedo* applied the reasonableness standard of *Waters*, the city (Appellee), because of its comprehensive pretermination hearing, would have been able to successfully meet a *Waters* reasonable investigation requirement.[197] Hence, it is possible that not all Oklahoma Supreme Court justices are expressly against the reasonableness standard of *Waters*. Rather, they appear more concerned about the precedential value of the plurality opinion as it pertains to First Amendment speech issues.[198] If this is in fact the case, and the justices are willing to apply a *Waters* standard to a state constitutional issue of employee speech rights, there is little doubt that some form of a reasonableness standard will eventually find its way into Oklahoma law.[199]

194. *See* Acevedo v. City of Muskogee, 897 P.2d 256, 262 (Okla. 1995); *see also id.* at 262 n.18.
195. *Id.* at 265 (Opala, J., concurring) (emphasis added) (footnotes omitted).
196. *See id.* (Opala, J., concurring).
197. *See id.* at 264 (Opala, J., concurring).
198. *See id.* at 260-61.
199. *See supra* note 193-94 and accompanying text.

VI. Conclusion

The decision of the Oklahoma Supreme Court in *Acevedo v. City of Muskogee* represents more than an attempt to resolve a public employee speech issue based on an alleged violation of an individual's First Amendment rights. *Acevedo*, more importantly, depicts what appears to be Oklahoma's disavowal of the United States Supreme Court's procedural doctrine of public employee speech as established in *Waters* and, thus, the creation of an independent public employee speech doctrine.

However, the creation of such a doctrine brings with it many questions. Foremost is the concern about the impact a new doctrine will have in resolving public employee speech issues. Oklahoma's doctrine, which employs a *Connick*-type interest balancing test, might be considered a more natural balance than the federal doctrine. Consequently, Oklahoma courts could become an appealing location for public employees searching for a place with less deference toward the governmental employee.

Precisely how Oklahoma's balancing doctrine will be interpreted is still unknown. There is a good argument to be made that the *Acevedo* balancing test was never constitutional and should therefore be disregarded. However, this issue will not readily be answered since Acevedo decided not to pursue an appeal to the United States Supreme Court. Hence, the only way to determine the doctrine's constitutionality will be for another public employee speech case to be brought in the Oklahoma court system.

The Oklahoma Supreme Court opened a Pandora's box when it decided not to apply the *Waters* reasonableness standard. In doing so, the court created a rift between federal and state law. Consequently, one may argue that the result the Oklahoma Supreme Court had hoped to avoid, a dichotomizing of federal law within the state, seems to be the result that has occurred. In the end, the original question remains: Is the *Acevedo* decision sound policy or a form of doctrinal mutiny? At present, the answer remains hidden behind a cloud of uncertainty, waiting for future mandates from the Oklahoma Supreme Court to either amend or reinforce the *Acevedo* doctrine.

Timothy Wilson